

BEFORE THE
PHYSICAL THERAPY BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

JOHN FRANCIS BARNIEA, PT
4150 George Avenue, #3
San Mateo, CA 94403
License No. AT 2977,

Respondent.

Case Nos. 1D 2003 63611
1D 2004 63881

OAH No. N2005030128

PROPOSED DECISION

Administrative Law Judge Melissa G. Crowell, State of California, Office of Administrative Hearings, heard this matter in Oakland, California, on May 9, 2005.

Deputy Attorney General Susan K. Meadows represented complainant Steven K. Hartzell, Executive Officer of the Physical Therapy Board of California.

There was no appearance by, or on behalf of, respondent John Francis Barniea.

The matter was submitted on May 9, 2005.

FACTUAL FINDINGS

1. Complainant Steven K. Hartzell made and filed the accusation in his official capacity as Executive Officer of the Physical Therapy Board of California.

2. Respondent John Francis Barniea did not appear at the hearing in this matter. Upon presentation of proof that respondent had been served in accordance with the requirements of the Administrative Procedure Act, the matter proceeded as a default hearing under Government Code section 11520. Service was attempted and/or made upon respondent at his address of record with the board, the address he listed on his notice of defense, and upon the address provided to the agency by respondent's probation officer as his current residence.

3. Respondent was issued license number AT 2977 by the board on January 19, 1993. The license expired on May 31, 2004.

4. On April 27, 2004, respondent was charged in the County of San Francisco with committing second degree robbery in violation of Penal Code section 212.5, subdivision (c), and second degree commercial burglary in violation of Penal Code section 459. It was alleged that on April 23, 2004, respondent unlawfully took personal property from Vanessa Zhu by means of force and fear, and entered a United Commercial Bank with the intent to commit larceny.

On May 25, 2004, the court issued an order pursuant to Penal Code section 23 prohibiting respondent from practicing physical therapy during the pendency of the criminal action.

Thereafter the complaint was amended to charge grand theft from the person in violation of Penal Code section 487, a felony. On September 30, 2004, respondent was convicted on his guilty plea to a felony violation of Penal Code section 487. The offense involves dishonesty and corruption and is substantially related to the qualifications, functions or duties of a physical therapist.

5. Imposition of sentence was suspended on October 10, 2004, and respondent was placed on formal probation for four years. Terms and conditions of probation included one year in county jail, to be served in an approved rehabilitation program, and payment of stated fines and fees.

6. By information filed on October 15, 2003, respondent was charged in San Mateo County with two felony counts: driving under the influence of alcohol and causing injury, in violation of Vehicle Code section 23153, subdivision (a), and driving with a blood alcohol level of .08 percent or more and causing injury in violation of Vehicle Code section 23153, subdivision (b). On October 22, 2003, respondent entered a plea of not guilty and was released on his own recognizance. Respondent was ordered to submit to chemical testing and to refrain from the use and possession of intoxicating beverages and controlled substances.

On January 14, 2004, the superior court issued a bench warrant for respondent's arrest on the ground that he had failed to comply with the terms of the OR program. In particular, respondent was hospitalized for a cocaine overdose on January 5, 2005. Respondent admitted to using cocaine on January 5, 2005. And respondent tested positive for cocaine on January 12, 2005.

7. Respondent's possession of cocaine was illegal (Health & Saf. Code, § 11350) and his use of cocaine was excessive. Respondent's excessive use of cocaine impairs his ability to practice physical therapy with safety and his excessive usage constitutes a danger to himself, the public and potential patients.

8. There is no evidence of mitigation or of rehabilitation.

9. The Board has incurred \$8,712 in costs for the investigation and enforcement of this matter during fiscal years 2003-2004 and 2004-2005. The costs are reasonable.

LEGAL CONCLUSIONS

1. Expiration of the license issued to respondent does not deprive the board of jurisdiction to proceed with this disciplinary action against respondent. (Bus. & Prof. Code, § 118, subd. (b).)

2. Under Business and Professions Code section 2660 the Board may revoke a physical therapy license for unprofessional conduct. Section 2660 defines unprofessional conduct to include: the conviction of a crime that is substantially related to the qualifications, functions or duties of a physical therapist (subd. (d)); violating or attempting to violate, directly or indirectly, any provision of the Medical Practice Act¹ (subd. (i)); and committing a fraudulent, dishonest, or corrupt act that is substantially related to the qualifications, functions or duties of a physical therapist (subd. (l)).

Business and Professions Code section 2239, subdivision (a), provides that the use of a controlled substance, a dangerous drug or an alcoholic beverage to the extent or in a manner as to be dangerous to the licensee, or to the public, or to the extent that it impairs the ability of the licensee to practice safely, constitutes unprofessional conduct.

Business and Professions Code section 2238 provides that a violation of any federal or state statute or regulation regarding dangerous drugs or controlled substances constitutes unprofessional conduct.

First Cause for Discipline

3. Grand theft from the person is an offense that is substantially related to the qualifications, functions or duties of a physical therapist. In addition, grand theft is an offense that has as one of its elements, the commission of a dishonest act. Cause exists to revoke respondent's physical therapy license under subdivisions (d) and (l) of Business and Professions Code section 2660 by reason of his conviction of grand theft as set forth in Factual Finding 4.

Second Cause for Discipline

4. Respondent's illegal and excessive use of cocaine as set forth in Factual Findings 6 and 7 constitutes unprofessional conduct as defined in Business and Professions Code sections 2238 and 2239. Cause exists to revoke respondent's physical therapy license under subdivision (i) of Business and Professions Code section 2660.

¹ The Medical Practice Act is set forth in Business and Professions Code section 2000 et seq.

Costs

5. Under Business and Professions Code section 2661.5, subdivision (a), the Board may recover its reasonable costs of investigation and enforcement of disciplinary actions against licensees. By reason of the matters set forth in Factual Finding 9, the reasonable costs of investigation and enforcement of this matter are \$8,712.

6. Absent any evidence in mitigation or rehabilitation, the protection of the public compels the revocation of respondent's physical therapy license.

ORDER

1. License number AT 2977 issue to respondent John Francis Barniea is revoked by reason of Legal Conclusions 3 and 4, jointly and for each of them.

2. Respondent shall pay the Physical Therapy Board of California \$8,712 for its costs of investigation and enforcement.

DATED: May 20, 2005.

Original Signed By: _____
MELISSA G. CROWELL
Administrative Law Judge
Office of Administrative Hearings

**BEFORE THE
PHYSICAL THERAPY BOARD
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA**

In the Matter of the Accusation)	Case #: 1D 2003 63611 Against:
Against:)	(Primary Case)
John Francis Barniea, PT)	OAH No.: N2005030128
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The foregoing Proposed Decision, in case number 1D 2003 63611, is hereby adopted by the Physical Therapy Board, Department of Consumer Affairs, State of California.

This decision shall become effective on the 7th day of July, 2005.

It is so ordered this June 7, 2005 .

Original Signed By:
Donald A. Chu, P.T., President
Physical Therapy Board
of California